

FEDERAL MAGISTRATES COURT OF AUSTRALIA

UM v MINISTER FOR IMMIGRATION & ANOR

[2005] FMCA 1590

MIGRATION – Review of decision of Migration Review Tribunal – partner visa – sponsorship – spouse relationship at time of application – whether genuine – relevant and irrelevant considerations – unreasonableness – pregnancy and miscarriage – living at same address – duration of relationship – legal obligations between parties – temporary separation – sole ownership of house – social aspects of relationship – privative clause decision – application dismissed.

Migration Regulations 1994, regulation 1.15A., Schedule 2 subclass 820

Bretag v Minister for Immigration, Local Government and Ethnic Affairs
(unreported, Federal Court, O'Loughlin J, 29 November 1991)

Davis v Minister for Immigration & Multicultural & Indigenous Affairs [2004]
FCA 686

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 66 ALR 299

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR
323

Applicant: YOON BIN UM

First Respondent: MINISTER FOR IMMIGRATION &
MULTICULTURAL & INDIGENOUS
AFFAIRS

Second Respondent: MIGRATION REVIEW TRIBUNAL

File Number: SYG 2073 of 2004

Judgment of: Mowbray FM

Hearing date: 19 September 2005

Delivered at: Sydney

Delivered on: 19 September 2005

REPRESENTATION

Counsel for the Applicant:	Ms Welshman
Solicitors for the Applicant:	Ren Zhou Lawyers
Counsel for the First Respondent:	Ms Francois
Solicitors for the First Respondent:	Australian Government Solicitor
Solicitors for the Second Respondent:	Australian Government Solicitor

ORDERS

- (1) The application be dismissed.
- (2) The applicant pay the first respondent's costs and disbursements of and incidental to the application fixed in the sum of \$6,000.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 2073 of 2004

YOON BIN UM
Applicant

And

**MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS**
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an ex tempore judgment which has been revised and edited from the transcript. It relates to a decision of the Migration Review Tribunal made on 16 June 2004. On 6 July 2004 the applicant sought judicial review of the Tribunal decision.

Background

2. The applicant is a citizen of Korea who arrived in Australia on 25 November 1999 on a visitor visa. She was subsequently granted two student visas the last of which was due to cease on 6 January 2002. On 4 January 2002 she lodged an application for migration to Australia based upon her relationship with the nominator who is an Australian citizen. At the time of the application the applicant held a subclass 560

visa and had never previously been involved in sponsorship or nomination.

3. The nominator and the applicant met in 1999 and on 13 October 2001 they were married in Sydney. On 19 April 2002 the Minister's delegate refused to grant the visa. This was followed by an application to the Tribunal on 20 May 2002. On 16 June 2004 the Tribunal affirmed the decision of the delegate not to grant the visa.

Tribunal decision

4. The Tribunal assessed the application primarily against the criteria for subclass 820 in Schedule 2 and regulation 1.15A of the *Migration Regulations 1994*. In making its decision the Tribunal took into account the evidence before the delegate as well as documentary and oral evidence provided by the applicant and other witnesses. The Tribunal made findings on the basis of this evidence against the relevant criteria.
5. The Tribunal was not satisfied that the visa applicant and nominator had joint major assets or had pooled their financial resources to the degree that would reasonably be expected of two persons in a genuine and ongoing relationship (paragraph 30). The Tribunal was unable to be satisfied that at the time of application the two parties had established a shared household together (paragraph 34).
6. Furthermore the Tribunal was not satisfied that the applicant and the nominator had demonstrated that the social aspects of their relationship were indicative of two persons who were in a genuine and continuing relationship (paragraph 38). Accordingly at paragraph 42 the Tribunal was unable to find that the two parties saw their relationship as a long-term one.
7. The Tribunal said at paragraphs 44 and 45:

... the Tribunal is not satisfied, on balance, that the review applicant and the nominator were in a genuine and continuing relationship at the time of application, or that they were mutually committed to a shared life as husband and wife to the exclusion of all others. The Tribunal has considered whether the evidence of the history of the relationship since that date of application

enables the Tribunal to find that a genuine relationship existed at the time of application. The Tribunal is not satisfied that the evidence of the history of the relationship since the date of application establishes that the parties were in a genuine relationship at the time of application.

The Tribunal finds that the requirements of regulation 1.15A are not met at the time of application. The Tribunal finds that the review applicant is not the spouse of the nominator at the time of the application pursuant to regulation 1.15A.

8. Further at paragraph 46:

Given these findings, and earlier findings in respect of the other subclass, the Tribunal has no alternative but to affirm the decisions under review. The review applicant does not meet essential criteria for the grant of a Class UK visa. It follows therefore that the review applicant does not satisfy essential criteria for grant of a Class BS visa.

Consideration

9. The relevant legislative provision is regulation 1.15A(3):

In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:

...

(af) a Partner (Residence) (Class BS) visa; or

a) (ag) a Partner (Temporary) (ClassUK) visa;

the Minister must have regard to all the circumstances of the relationship, including, in particular:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

- (iv) *whether one party to the relationship owes any legal obligations in respect of the other; and*
 - (v) *the basis of any sharing of day-to-day household expenses;*
- (b) *the nature of the household, including:*
 - (i) *any joint responsibility for care and support of children, if any; and*
 - (ii) *the parties' living arrangements; and*
 - (iii) *any sharing of responsibility for housework;*
- (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
 - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities;*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*

10. The classic statement of the principles for relevant and irrelevant considerations is found in Mason J's judgment in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 66 ALR 299. His Honour stated at 308:

(A) The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to

take into account a consideration which is he bound to take into account in making that decision ...

(B) *What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations this court has held that where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except insofar as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard. ... By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by terms of the statute, the court will not find that the decision-maker is bound to take that particular matter into account unless an implication that he is bound to do so is to be found in the subject matter, scope and purpose of the Act.*

11. Furthermore, in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 McHugh, Gummow and Hayne JJ stated at 73:

The considerations that are, or are not, relevant to the Tribunal's task are to be identified primarily, perhaps even entirely, by reference to the Act rather than the particular facts of the case the Tribunal is called on to consider.

12. Having regard to those principles, I now examine the grounds that are raised in the amended application and a number which were agitated at the hearing but which were not included in that application.

Circumstances of the relationship: pregnancy and miscarriage

13. The first ground relates to pregnancy and a miscarriage. In the applicant's submissions she referred to the introductory words of regulation 1.15A(3):

... the Minister must have regard to all of the circumstances of the relationship, ...

14. The applicant asserted that the Tribunal failed to have regard to all such circumstances. In looking at the nature of the parties' commitment to each other the applicant said that the Tribunal was not limited to the items in regulation 1.15A(3)(d)(i)-(iv). In not taking into account the applicant's pregnancy and miscarriage the Tribunal failed to apply the regulation as it was bound to do. In her written submissions she said at 14:

The failure to have regard to a pregnancy and miscarriage is an important piece of evidence concerning the circumstances of the relationship because it corroborates the evidence of the desire of the applicant and nominator to start a family.

15. The desire of the applicant and her partner to start a family was an important consideration. In oral submissions the applicant's counsel stated that the key criterion to which the Tribunal must have regard was the sexual relationship. She said this was an essential criterion in the *Peko-Wallsend* sense. Noting the introductory words in regulation 1.15A(3) quoted above, it was something to which the Tribunal must have regard.

16. In my view it is clear from the Tribunal's reasons that it specifically considered the applicant's desire to start a family. In paragraph 42 of its reasons the Tribunal said:

The Tribunal has given some weight to the evidence that they have discussed the possibility of starting a family.

17. It is implicit in this that the Tribunal also had regard to the sexual relationship between the parties.

18. Furthermore, the Tribunal referred at paragraph 14 to additional evidence that it had before it including:

Medical documents relating to the review applicant.

19. I see no reason to read this as excluding those medical documents which related to the miscarriage of the applicant. These documents are reproduced at page 117 and the following pages of the Court Book.
20. In my view pregnancy and miscarriage, sexual relationships and the desire to start a family are not relevant considerations in the *Peko-Wallsend* sense. They are factors which may be examined in the context of regulation 1.15A(3)(d), that is, the nature of the persons' commitment to each other. Indeed material on pregnancy and miscarriage forms only part of the evidence available to the Tribunal in reaching its conclusions on the matters it is required to consider under regulation 1.15A(3)(d).
21. In reaching this view I am conscious of what Dowsett J said in *Davis v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 686 at 35:

Although subreg 1.15A(3) requires that the Minister 'have regard to all the circumstances of the relationship including' the various matters specified, it does not require that the Tribunal make specific findings considering any of those matters. ... There is no obligation upon a tribunal of fact to make findings as to whether it accepts or rejects every allegation made in the course of evidence. In some cases allegations may be so fundamental to the ultimate matter for determination that findings concerning them will be essential. In most cases, however, individual facts will be of less significance than the overall effect of the evidence.

Living at the same address for six months

22. This issue was not included in the amended application but was contained in the applicant's outline of submissions. The applicant asserted that the Tribunal failed to take into account that the nominator and the applicant had been living together for a period in excess of six months (see regulation 1.15A(5)).
23. This ground was not pressed at the hearing as according to their own accounts the applicant and her nominator had only been living together for two months at the time of application – this being the critical time.

Duration of relationship

24. This ground was also not included in the amended application but was raised at the hearing. The ground was essentially that the Tribunal failed to consider two compulsory requirements set out in regulations 1.15A(3)(d)(i) and (ii) - namely the duration of the relationship and the length of time during which the persons had lived together.
25. In my view the Tribunal's reasons must be read as a whole, bearing in mind what Dowsett J said in *Davis*.
26. It is clear from paragraph 24 of the reasons that the Tribunal was aware that the applicant and the nominator were married to each other on 13 October 2001. The Tribunal also considered the somewhat contradictory evidence relating to the nature of their household and their living arrangements at paragraphs 31 to 34.
27. The Tribunal said under the heading "The nature of the persons' commitment to each other" at paragraphs 39 and 40:

The review applicant stated in the visa application form that she met the nominator at a café in Sydney in November 1999. Statements from friends indicate that they met at the café being managed by the nominator at the time. The Tribunal finds there is little other evidence to establish the nature of the relationship prior to the marriage.

As indicated above, the Tribunal is not satisfied at the time of the application that the 2 parties had established a household together.

28. The Tribunal accepted that the applicant had commenced a married relationship with the nominator in October 2001 after having met him in a cafe in Sydney in November 1999. However it was unable to establish that there was any relevant relationship prior to the marriage. The Tribunal was not satisfied on the evidence that the duration of the relationship went back before the marriage. The Tribunal therefore reached certain views about the length of the relationship. Furthermore paragraph 40 records the Tribunal as being unable to find that the parties had established a household together at the time of application.

29. On a fair reading of the Tribunal's reasons - not attempting to examine them with a fine toothcomb – the Tribunal did address these two considerations.

Legal obligation between parties

30. Regulation 1.15A3(a)(iv) provides that the Tribunal must consider whether one party to the relationship owes any legal obligation in respect of the other. Ms Welshman for the applicant said the Tribunal did not address this consideration. She accepted there was no evidence on this particular consideration but submitted that the Tribunal must record the question in its reasons and dismiss it accordingly.
31. Having regard to what Dowsett J said in *Davis* I believe that this submission is misconceived and must be rejected.

Temporary separation

32. The applicant asserted that in its consideration of regulation 1.15A(1A) (b)(iii)(B) the Tribunal took into account a period of temporary separation between the applicant and the nominator in the week prior to the interview with the delegate of the Minister. Reference was made to paragraphs 33 and 34 of the Tribunal reasons. The applicant submitted that to consider a temporary separation as evidence of a non-genuine marriage misapplied the regulation.
33. Again the submission is misconceived. The Tribunal did not consider the evidence of temporary separation when applying the paragraph of the regulations suggested by the applicant. Rather the temporary separation was considered in the context of regulation 1.15A(3)(b) - the nature of the household. It was in this context that the Tribunal examined the evidence in the interview with the delegate and at the hearing about the living arrangements in March 2002. That is clear from pages 250 and 251 of the Court Book.
34. The Tribunal used the information that the parties had spent a week apart to support its finding that they gave contradictory evidence to the delegate and the Tribunal. This reflected adversely on their credit. This is set out at paragraphs 33-34 where reference is made to the

significant contradictory evidence on the living arrangements of the nominator and applicant. I accept the respondent's submissions in this respect.

35. The applicant also argued in oral submissions that it was impermissible to have regard to the issue of a temporary separation which occurred after the date of application. In my view such evidence is relevant as, at the time of the interview, the nominator was unable to accurately state the term of the lease for the apartment in which they were jointly living (see page 80 of the Court Book). As O'Loughlin J said in *Bretag v Minister for Immigration, Local Government and Ethnic Affairs* (unreported, Federal Court, 29 November 1991):

But the evidence of the subsequent history is only relevant so long as it "tends logically to show the existence or non-existence of facts relevant to the issue to be determined": Minister for Immigration & Ethnic Affairs v Pochi (1980) 4 ALD 139 at 160 per Deane J.

36. Reference therefore to this period of separation is clearly permissible.

Sole ownership of the house

37. Regulation 1.15A(3)(a)(i) provides in effect that the Tribunal must have regard to the financial aspects of the relationship, including:

any joint ownership of real estate or other major assets.

38. Evidence was given to the Tribunal that the applicant had purchased property in her name alone. The applicant submitted at paragraphs 27 and 28 of her submissions that:

... it is improper to take into account evidence of sole ownership as evidence that the marriage is not genuine, unless there [sic] further evidence to corroborate such a proposition. There may be numerous reasons for the applicant to purchase the property in her name alone, including but not limited to the benefits of first home owner's grant and stamp duty exemptions as well as investment strategies and tax minimisation.

To give such consideration to a purchase in the applicant's name alone as evidence that the marriage is not genuine misapplies the regulation.

39. The applicant did not refer to any evidence before the Tribunal giving financial or other reasons for the sole ownership of the home. As the respondent pointed out in her supplementary submissions at paragraph 8:

The Applicant asserts that there may have been financial reasons for the sole ownership of the home. However she does not refer to any evidence before the MRT to support such a suggestion, does not explain why this would offset her own sole responsibility for repayment of the mortgage, nor why her nominator in the statutory declaration suggests that they had purchased the property jointly.

40. The Tribunal dealt with this issue at paragraphs 29 and 30:

...The Tribunal also notes that the review applicant purchased property in June 2003, but in her name only.

The Tribunal has taken account of utility accounts variously in single names and in joint names, as well as rent receipts and bond lodgements in joint names. The Tribunal has given this evidence some weight, but on balance the Tribunal is not satisfied that the visa applicant and nominator have joint major assets or have pooled their financial resources to a degree that would reasonably be expected of 2 persons in a genuine and ongoing relationship.

41. In my view the purchase of the property by the applicant was simply another piece of evidence which the Tribunal was entitled to consider when examining the financial aspects of the relationship. The Tribunal treated this evidence in a manner entirely consistent with its statutory obligations, as well as the legislative purpose - that is whether there was an ongoing joint commitment between the applicant and nominator.

Social aspects of the relationship

42. The applicant took exception to the use by the Tribunal of evidence relating to various social aspects of the marriage or the relationship, including photographs of the wedding, the relationship between the applicant and her parents and the relationship between the applicant's husband and his parents. There seem to be two grounds for this concern: firstly that this evidence was irrelevant and secondly that in

using this evidence the Tribunal reached a conclusion which was unreasonable.

43. It is clear that this material was before the Tribunal. In my view the Tribunal legitimately used these items of evidence in reaching conclusions on the social aspects of the relationship. It was open to the Tribunal on the evidence to find that the applicant and the nominator had not demonstrated that the social aspects of their relationship were indicative of people in a genuine and continuing relationship.
44. This conclusion and the approach taken by the Tribunal falls a long way short of being unreasonable in the *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). The ground must also be rejected.

Conclusions

45. The Minister submitted that the application must be dismissed as no reviewable legal error has been disclosed. I agree. The Tribunal was unable to satisfy itself that the applicant was a spouse of the nominator, in the sense understood in regulation 1.15A, at the time of her application for a visa. The findings the Tribunal made were reasonably open to it on the material before it. I am not satisfied that the Tribunal made any legal error going to jurisdiction in coming to its decision.
46. I find that the decision of the Tribunal is a privative clause decision having regard to the High Court's decision in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.
47. In addition, the decision of the Tribunal was a bona fide attempt to exercise its power. It clearly related to the subject matter of the *Migration Act 1958* and to the powers conferred on the Tribunal.
48. In the circumstances the application must be dismissed.

I certify that the preceding forty seven paragraphs are a true copy of the reasons for judgment of Mowbray FM.

Associate: Natasha Werner

Date: 6 December 2005